



Dedication Requirements
Protecting Colorado's Open Space

Dear Reader:

ERO Resources, the Town of Parker, Arapahoe County, Teller County, and the Town of Windsor are pleased to jointly produce Dedication Requirements, Protecting Colorado's Open Space.

Dedication requirements are one of many tools used by local governments to ensure impacts from future developments are appropriately balanced. The majority of open space dedication requirements are incorporated under the subdivision regulations.

When a developer submits a development proposal, the local government may require or recommend that the developer dedicate a portion of the subject property as open space. This land may be dedicated to the local government jurisdiction, or in some cases to a community conservation group such as a land trust. The open space dedication requirement can also be part of the planned urban development (PUD) negotiation process or annexation process. As demonstrated in this report, open space dedication requirements vary as widely as the definitions of open space.

This survey report is designed to assess what types of dedication requirements Colorado communities are using to protect open space. We welcome your comments and invite discussion about putting dedication requirements to work in your community.

Sincerely,

A handwritten signature in dark ink, appearing to read "Justin Spring", is positioned above the printed name.

Justin Spring
Natural Resource Specialist
ERO Resources



Dedication Requirements

Protecting Colorado's Open Space

A survey report from

ERO Resources Corporation

Town of Parker

Arapahoe County

Teller County

Town of Windsor

Developed with assistance from

Colorado American Planning Association

Colorado Counties, Inc.

Colorado Municipal League

Colorado Open Space Alliance

February 2002

THE SURVEY

The Towns of Parker and Windsor, and the Counties of Teller and Arapahoe, with additional funding from a grant through the Governor's Office of Smart Growth, decided to pursue a study of open space dedication requirements administered by local governments in Colorado. ERO Resources executed the survey and collected and analyzed information regarding—

- Methods employed to calculate open space dedication requirements;
- Process to integrate these requirements into land use/development planning frameworks;
- Use of credit and non-credit standards;
- Feasibility of implementing impact fees and cash-in-lieu of open space land, and the potential exposure to lawsuits filed by private parties against local governments in the event a “taking” occurs when open space land dedication requirements are implemented without demonstration of an adequate “rational nexus” or “proper proportionality.”



In June 2001, a website for the survey was developed and a link

(www.eroresources.com/survey) posted on the Colorado American Planning Association (APA) web page and the Colorado Counties web page.

In addition, an advertisement containing the survey internet address was posted on the Colorado APA listserv, the Colorado Counties newsletter, the Colorado Open Space Alliance (COSA) listserv, and the Colorado Municipal League (CML) newsletter. In July 2001, a hard copy of the survey was mailed to 333 counties and municipalities throughout the state. In total there were 112 respondents, giving a response rate of 34 percent. Of the 112 respondents, 25 were from counties and 87 were from municipalities. The responses from this survey are summarized in this report.

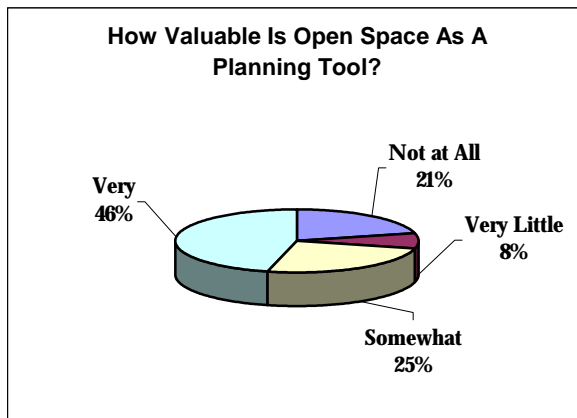
How is Open Space Defined in Colorado?

The range of open space definitions varies widely throughout the state. This affects the variation of dedication requirements collected as part of this study. There is a direct relationship between how open space is defined and what type of dedication requirement a local government adopts. Often, this is a reflection of location or the political structure; metropolitan versus rural, city versus county, and home rule versus non-home rule. This variation is illustrated in the following open space definitions—

- **City of Sterling.** “Land intentionally left free of development for recreation, resource protection, amenities, aesthetics, hazard avoidance, or buffering purposes and that is protected by the provisions of this and/or other ordinances to ensure that such lands remain in such uses. Any development which is necessary to or customarily associated with open space uses shall be permitted only upon compliance with the provisions of this and other governing ordinances.”
- **Town of Paonia.** “Land retained in an open or unimproved condition except for agricultural for the placement of landscape materials including trees, shrubs, and grasses and structures limited to footpaths and bridges, irrigation structures, and erosion-protection devices and underground utilities or improved for park use as defined herein. Ownership of such land may be private with an easement or reservation for "open space" use by deed restriction; it may be deeded or reserved to a property owner's association; or it may be dedicated to the public. Designation of an "open space" does not imply the provision of access by the public.”
- **Adams County.** “Lands and waterways dedicated to public use and enjoyment; to the conservation of wildlife and natural resources; that are private areas used for farming, ranching or other agricultural practices which retain the rural undeveloped character of an area; needed for the health and safety of the community; that function as community separators or buffers.”
- **Custer County.** “Area of land or water which is essentially unimproved and devoted to preservation or management of natural resources and/or for use as active or passive outdoor recreation areas. The term shall not include space devoted to streets, or parking and loading areas.”

How Valuable is Open Space as a Planning Tool?

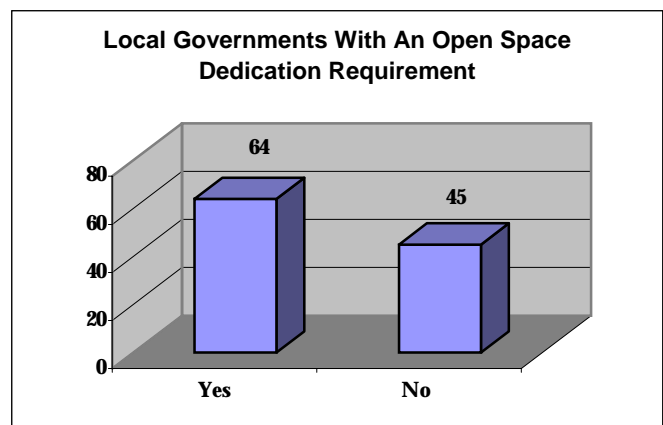
Over 70 percent of counties and municipalities responding to this survey indicated that open space is valuable as a planning tool. As concerns over growth in Colorado continue to rise, protection of open space is critical to preserving quality of life, maintaining community identity, preserving viewsheds, and protecting wildlife habitat and wetlands.



Local governments use a number of methods to implement open space as a planning tool ranging from regulatory methods such as open space dedication requirements, impact fees, and transfer of development rights to market-oriented methods including fee simple acquisition, purchase of land with leaseback, and conservation easements.

What Are Open Space Dedication Requirements?

Open space dedication requirements are one of many tools used by local governments to ensure impacts from future developments are appropriately balanced. The majority of open space dedication requirements and cash-in-lieu programs are incorporated under the subdivision regulations. When a developer submits a development proposal, the local government may require or recommend that the developer dedicate a portion of the subject property as open space. This land may be dedicated to the local government jurisdiction, or in some cases to a community conservation group such as a land trust. The open space dedication requirement can also be part of the planned urban development (PUD) negotiation process or annexation process. As demonstrated in this report, the requirements for open space dedication vary as widely as the definitions of open space. Although over half of the respondents (64) indicated they had an open space dedication requirement, further analysis revealed that this varied between a public land requirement and an open space impact fee.



TYPES OF DEDICATION REQUIREMENTS IDENTIFIED IN THE SURVEY			
	Total	Counties	Municipalities
Public land requirement	10	3	7
Parks, trails, open space requirement	35	7	28
Open space requirement	18	4	14
Open space impact fee	1	0	1

EXAMPLES OF OPEN SPACE DEDICATION REQUIREMENTS	
Local Government	Dedication Requirement
Public Land Requirement	
City of Louisville	12 percent for commercial and industrial; 15 percent for residential
City of Westminster	Sliding scale of 10 to 25 percent based on density; must be developable land
Lafayette	Residential = 12 percent of total land; nonresidential = 6 percent of total land
Park County	2 percent of gross area
Parks, Trails, Open Space Requirement	
Town of Breckenridge	10 percent of gross area
City of Lakewood	5.5 acres per 1,000 residents
Town of Superior	10-45 percent varies by zoning
Town of Meeker	Negotiated during the subdivision process.
City of Alamosa	8 percent or maintain current ratio of 23.52 acres per 1,000 population
City of Longmont	Based on percentage of land per 1,000 people and the land use map
City of Arvada	Single family home = 10 percent of gross area; PUD = 30 percent for parks and open space
Town of Windsor	7 acres per 1,000 people
Pueblo County	0.025 acres per dwelling unit
Hinsdale County	Minimum of 25 percent
Boulder County	Based on number of lots created by subdivision and impact they create. Park: 25 acres per 1,000 occupants for residential and up to 3 percent of total land for commercial, industrial, or other nonresidential areas.
Teller County†	25 percent of gross area (4 percent of this amount is required for parks)
Open Space Requirement	
Crested Butte	.81 acres of open lands for each residential unit
City of Steamboat Springs	15 percent of gross site area
Town of Rico	10 percent of gross area and undevelopable lands must be zoned open space during the subdivision process
Town of Pagosa Springs	5 percent in subdivisions by square footage or acreage
Manitou Springs	5 percent of gross development plus 600 square feet per dwelling unit up to 25 percent maximum of gross area
Littleton	By zoning district: Residential/A-1= 50 percent as unobstructed open space; Multifamily= 25 percent; Commercial= 10-25 percent
Town of Parker	Minimum of 20 percent of total development parcel
Town of Winter Park	Up to 5 percent at subdivision
Routt County	5 percent of the total land area for subdivisions; 25 percent requirement for a PUD
Grand County	PUD: minimum of 25 percent of total PUD area and not to include more than 15 percent undeveloped open space. Rural: 67 percent of total area of cluster development; Subdivision: 20 percent of total area suitable for public purposes such as parks, flood channels, scenic areas and green belts; 60 percent of total land covered in the apartment house, condominium, or townhouse area suitable for public purposes.

† Teller County land use regulations are currently under review. Refer to Teller County website at <<http://www.co.teller.co.us>>

Are There Alternatives To Open Space Dedication Requirements?

In the survey, a number of communities described alternatives to open space dedication requirements. In some cases these alternatives are viewed as more equitable to landowners. The following examples were drawn from Berthoud, Routt County, Larimer County, and Douglas County.

Density Transfer Fee

The Town of Berthoud uses an alternative to an open space dedication requirement. Berthoud adopted a "density transfer fee," which is essentially a fee-in-lieu of a transfer of development rights (TDR) program. It follows the TDR concept of transferring density but it acts like an open space impact fee. The amount is \$3,000 per single-family home and is collected at the building permit stage. The money is used to purchase development rights in the surrounding farmland in accordance with the Land Use Plan.

Routt County employs a similar program called the Land Preservation Subdivision process. In this process, open lands are preserved in exchange for density bonuses for every 100 acres of land placed in a conservation easement.

Rural Land Plans

The Rural Land Use Process was developed by Larimer County to offer landowners a new approach for developing land without a full subdivision review. "The Rural Land Use Process does not change the zoning for lands, nor does it take away the ability to do 35-acre developments. Instead, the process gives incentives to encourage alternative development and help retain the rural and agricultural lands of Larimer County. This process is intended to be voluntary, user friendly, and flexible."[‡] The advantage of this process is that it encourages clustering in one portion of the property, and preserves the remaining land through a conservation easement or a protective covenant. Typically, rural land plans reserve close to two-thirds of a property as open space. Douglas County has a similar program, the Rural Site Plan (RSP) process. The RSP process is administrative and provides a density bonus as an incentive to preserve open space. This process allows landowners a reasonable use of their land while retaining the rural character of the land.



[‡] Larimer County. 1997. Rural Land Use Process. August 14, 2001. <http://www.co.larimer.co.us/rluc/index.htm>.

What Types of Credit and Non-Credit Standards Exist in Colorado?

Floodplains. In the survey, 18 municipalities indicated they had a credit or non-credit standard. Of these 18 communities, half reported offering partial or full-credit for floodplains or golf courses. One municipality offered 100 percent credit for floodplain areas contingent upon a trail being built within the floodplain for recreational use. The other municipalities ranged between 15 percent and 50 percent credit for floodplains.

Town of Crested Butte. Crested Butte has no credit standards under its subdivision regulations; however, Crested Butte does have credit standards within its annexation process. The annexation standards require up to five acres of open lands for each residential unit. If the open lands are valuable because of wildlife habitat, scenic views, or wetlands, then only three acres of open lands are required. For every affordable housing unit, only one acre of open land is required.

What Can Be Accepted In Place of An Open Space Dedication Requirement?

Cash-In-Lieu. 45 (35 municipalities, 10 counties) respondents said their jurisdiction accepts cash-in-lieu of the open space dedication requirement. The majority of communities surveyed calculated the cash-in-lieu by the fair market value of the land based on an appraisal. A few communities required a fee per dwelling unit or a fee per square foot. Five respondents indicated “Other,” which varied between accepting conservation easements to accepting a park land dedication fee.

Can a Colorado Revised Statute Be Used To Support An Open Space Dedication Requirement?

Seven counties with park and trail requirements cited Colorado Revised Statute (CRS) 30-28-133, Subdivision Regulations for park and school land dedication. This statute does not explicitly authorize counties to require a dedication of open space; however, it does provide for lands dedicated as parks. One county cited CRS 30-28-401, which allows counties to encourage clustering to meet county goals of preserving open space, wildlife habitat, and the rural character of the land. The State of Colorado currently enables municipalities to enact Home Rule Authority (see *Summary of Legal Issues*).



Summary of Legal Issues*

The amount of open space required through an open space dedication should be proportional to the land area of the parcel(s) that is the subject of the development application. It must meet the rational nexus test. “Takings” becomes an issue when a private party believes a local government entity is requiring an amount of land or cash out of proportion to the impact of their development. It arises also when an impact fee is required in addition to a dedication of land. In a sense, this is construed as having “too many hands in the cookie jar.”

The rational nexus test requires:

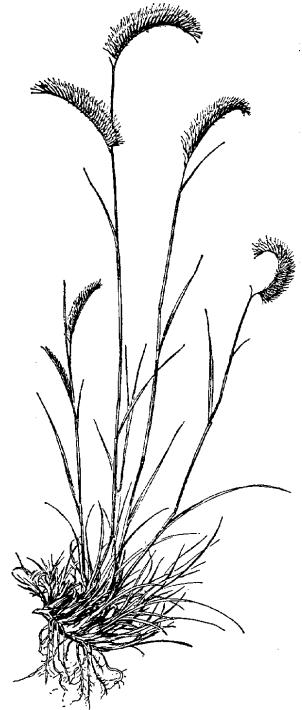
1. The jurisdiction must have the authority to impose the fee;
2. New development causes a need for open space;
3. A reasonable connection between the growth from new development that will pay the fees and the need for open space to be financed by the fees; and
4. A connection between the expenditure of the fees and the benefits to be enjoyed by those who pay.

Although Colorado has no general enabling statute authorizing local governments to impose development impact fees, local governments rely on one of several sources:

- Home Rule Authority
- Explicit legislation
- Case law

Home Rule Authority

Municipalities that require an open space dedication requirement use their Home Rule authority. In addition, home rule communities can impose impact fees as long as such fees are related to the broadly stated purposes of a local zoning or other land use ordinance. Home rule authority may be authorized for cities and towns under Article XX, Section 6, of the Colorado Constitution; and Article XIV, Section 16 for counties. As a general rule, home rule communities are subject to the statutes of Colorado except when those statutes are superseded by the charters of such communities. In issues of purely local concern, home rule overrides state power. While this is substantiated for home rule cities in such cases as *City of Colorado Springs v. Smartt*, “there is very little case law on this issue in regard to



*This section was adapted from Duerksen, C.J., Ragonetti, T.J., Macdonald, J.T. 1997. Development Impact Fees In Colorado. Rocky Mountain Land Use Institute Research Monograph Series No. 2.

home rule counties (Id.). In *Smartt*, the court held that, where a dispute involves a home rule city, its zoning policies and authority are governed by its own charter and ordinances. As long as impact fees are related to the broad purposes of a home rule community's local zoning or land use ordinance, they will likely be upheld by Colorado courts. In *Zavala v. City and County of Denver*, the court supported the City of Denver's actions because they fell within the zoning authorization of its city charter. Although substantial evidence exists to support home rule authority on issues of local concern, home rule communities must remain aware of the possibility that impact fees may conflict with state legislation if it's an area of statewide concern.

Explicit Legislation

Unlike States such as New Mexico, Colorado has no broad enabling legislation concerning development impact fees. Local governments have used a few specific enactments of the legislature to enact impact fees. Colorado Revised Statutes Sec. 30-28-133(4) provides Colorado counties with explicit powers to require the dedication of property or fees-in-lieu for parks, school sites, and storm drainage detention facilities during the subdivision approval process.

Case Law

Colorado courts have construed zoning, planning, subdivision and other general land-use legislation to find authority for the imposition by local government of development fees and other exactions upon a landowner in connection with approval of specific developments. The most frequently cited case law appears to support a clear willingness by the courts to allow local governments conditional approval of subdivisions, planned unit developments (PUDs), and other development matters, upon payment by the developer of charges for governmental costs which will be caused by the development. In *Beaver Meadows v. Board of County Comm'rs* and *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, the Colorado Supreme Court interpreted land use statutes as granting local governments broad authority in connection with approval of specific development requests. It is important to note that these cases involved imposition of a fee as a condition of approval for a specific development plan. This is often decided through a negotiation process. Opponents of impact fees question whether non-home-rule governments have authority to impose jurisdiction-wide impact fees.

For further information or a copy of the report, please contact:

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ERO Resources is a team of scientists and planners with diverse backgrounds and a shared interest in environmental issues. ERO's expertise in science and planning provides an approach to the environment that balances development with natural resources protection. With offices in Denver and Boise, ERO strives for a close working relationship with their clients. ERO listens closely to their clients' needs and expectations, and develops solutions for accomplishing project goals within an environmental framework. ERO provides services in natural resources investigations, environmental impact assessment and permitting, water resources, hazardous waste investigations, open space planning and management.

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